Renofac Builder (M) Sdn Bhd v Chase Perdana Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S5-22-740 OF 1998
JAMES FOONG J
22 APRIL 1999

Civil Procedure — *Summary judgment — Application premature — Conditional appearance still subsisting — Whether summary judgment should be granted*

On 22 December 1998, the plaintiff had filed a writ of summons against the defendant which was duly served. The defendant promptly entered a conditional appearance on 23 December and later proceeded with an application to set aside the plaintiff's writ. On 9 January 1999, the plaintiff filed an application under O 14 of the Rules of the High Court 1980 against the defendant. Both applications were heard and dismissed by the senior assistant registrar. The plaintiff appealed against the dismissal of the O 14 application.

Held, dismissing the appeal with costs:
The plaintiff's O 14 application was filed prematurely as the conditional appearance of the defendant was still subsisting. This is not a case in which the premature O 14 application could be condoned (see pp 507F–508A); *Sungei Way Leasing Sdn Bhd v Sena Land Development Sdn Bhd* [1989] 3 MLJ 37 distinguished.

[Bahasa Malaysia summary

Pada 22 Disember 1998, plaintif telah memfailkan satu writ saman terhadap defendan yang telah diberikan kepadanya. Defendan dengan segera memasukkan kehadiran bersyarat pada 23 Disember dan kemudian memulakan permohanan untuk mengketepikan writ plaintiff. Pada 9 Januari 1999, plaintif telah memfailkan permohonan di bawah A 14 Kaedah-kaedah Mahkamah Tinggi 1980 terhadap defendan. Kedua-dua permohonan telah didengar dan ditolak oleh penolong kanan pendaftar. Plaintif telah merayu terhadap pembatalan permohonan A 14 tersebut.

Diputuskan, menolak rayuan dengan kos:
Permohonan A 14 plaintif telah difailkan terlalu awal kerana kehadiran bersyarat defendan masih berterusan. Ini bukanlah suatu kes di mana permohanan A 14 boleh dibiarkan sahaja (lihat ms 507F–508A); *Sungei Way Leasing Sdn Bhd v Sena Land Development Sdn Bhd* [1989] 3 MLJ 37 dibeza.]

Notes

For cases on summary judgment, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4372–4778.

Cases referred to

Sungei Way Leasing Sdn Bhd v Sena Land Development Sdn Bhd [1989] 3 MLJ 37 (refd)

Legislation referred to

Rules of the High Court 1980 O 14

K Goik (*Malik & Partners*) for the plaintiff.

Yee Teck Fah (*Ong Gek Lin* with him) (*Yee Teck Fah & Co*) for the defendant.

James Foong J: This is an appeal by the plaintiff against the order of the Senior Assistant Registrar ('the SAR') in dismissing its O 14 application made under the Rules of the High Court 1980 ('the RHC').

The primary issue taken here and below by the defendant flows from the following chronology of events:

(1) On 22 December 1998 the plaintiff filed a writ of summons against the defendant and it was duly served on the latter on 25 December 1998.

(2) On 23 December 1998, the defendant entered, with leave of court, a conditional appearance.

(3) On 29 December 1998, duly complying with the term set by the court for the conditional appearance, the defendant filed an application (encl 5) to set aside the plaintiff's writ of summons.

(4) On 9 January 1999, the plaintiff filed an application (encl 8) under O 14 of RHC against the defendant.

(5) Enclosures 5 and 8 respectiveiy were heard consecutively by the SAR on 27 January 1999.

(6) Both enclosures were dismissed.

It is and was the defendent's contention that the plaintiff's O 14 application was filed prematurely, when the conditional appearance of the defendant was still subsisting.

I am in full agreement with this argument. Suffice me just to quote from the *Supreme Court Practice, Malaysian Edition* (The White Book) at p 133, under the second paragraph of 14/1/2 the following:

> (a) Appearance by defendant — This is a preliminary necessity to apply for summary judgment under O 14. The words of r 1 preclude an application under O 14 before the defendant has appeared, ie has either entered an unconditional appearance or his conditional appearance has become unconditional. If there is no appearance, judgment in default of appearance may be entered under O 13. If the appearance is conditional, the plaintiff cannot apply under O 14 so long as the appearance is conditional (*Richard v Scussok*, per Channel J at Chamber, 15 December 1901).

Faced with this well established principle the plaintiff's counsel attempted to convince me with the ruling made by Edgar Joseph Jr J (as he then was)

in *Sungei Way Leasing Sdn Bhd v Sena Land Development Sdn Bhd* [1989] 3 MLJ 37 which treated a premature O 14 application, although with no appearance filed, as an irregularity which could 'be condoned'. I cannot accept this proposition. I am of the view that this *Sungei Way* case can be distinguished on two grounds. Firstly, there was a defence filed when in our present situation, the defendant had not taken such step in the proceeding. Secondly, the primary issue of contention raised by the defendant in this O 14 application is this allegation of premature application. With this, I am not convinced that the argument on the merits of the O 14 application by the defendant having been raised (as in the *Sungei Way* case) can override the material flaw in the plaintiff's application of it being made too prematurely, ie when notice of conditional appearance was made known to the plaintiff, and the application by the defendant to set aside the writ of summons was not disposed of.

Accordingly, I hereby dismiss this plaintiff's appeal with costs.

Appeal dismissed with costs.

Reported by Joel Ng